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No. 90-1431

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1990

DAVID STIKES, an individual, on behalf of himself and all other persons similarly situated,

Petitioners,

v.

CHEVRON U.S.A., INCORPORATED, a Pennsylvania Corporation; and DOES 1 through 50, inclusive,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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The fundamental flaw in both the Opposition and the opinion of the court of appeals is that they so obliterate this Court's explicit rulings, that preemption occurs only when the claim of the plaintiff is "inextricably intertwined" with the collective bargaining agreement ("CBA"), that they produce preemption whenever there is a CBA that has any provisions, no matter how general, that might bear in some unspecified way on the plaintiff's claim. In this reply, we highlight the

most significant examples of this flaw in the Opposition and show why it underscores the need for review on both the preemption and the removal issues, which respondent improperly merges together.

1. The Petition posed three hypotheticals concerning the relationship between the CBA and Stikes' privacy claim under the California Constitution, and argued that, under the preemption and removal approach adopted by the court of appeals, in each case the claim would be preempted by section 301 of the Labor-Management Relations Act ("LMRA"). Petition at 11-12. Respondents concede the accuracy of this contention, Opposition at 9-10 n.6, and thus concede that Stikes' claim would be preempted under the decision below even if the CBA provided rights parallel to the privacy claim and even if the CBA had no bearing on the claim. What respondents fail to do is to reconcile this extraordinarily broad preemption doctrine with this Court's decisions.

In order to fend off the impact of the hypotheticals, respondents are compelled to argue that state law claims are preempted if they are " 'substantially dependent' on the *process* of construing a [CBA]." Opposition at 9 (emphasis in original). But no decision of this Court so holds, and neither did the Ninth Circuit -- it is the CBA itself on which the state claim must depend in order for the employer to obtain the benefits of federal preemption, and the dependence must be "substantial." That is what this Court held in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), that is what the Court has said in every one of its other decisions in this area, and indeed that is what respondents themselves concede elsewhere. *E.g.*, Opposition at 10 n.7 ("*only* claims that are substantially dependent on the terms of a [CBA] are preempted") (emphasis in original). To be sure, it was concerns about interference with the grievance and arbitration "process" that have driven the development of section 301 preemption doctrine.

However, the Court has only permitted state workplace laws to be actually preempted when those regulations "substantially" depend on the CBA itself, not on the mere process of contract interpretation.

Nor do respondents come to grips with the impact of their novel preemption doctrine. They argue that their approach does not leave the employee remediless because the employee may always bring a section 301 action. Opposition at 10. But they ignore the fact that, under one of the hypotheticals that they concede, the CBA contains *no* provisions bearing on privacy at all, and so a section 301 action based solely on the CBA is worthless for the employee. Similarly, they ignore the substantial differences between the remedies available under section 301 and under state law. Thus, even where the CBA incorporates state privacy law, the impact of federal preemption is to strip the employee of remedies, such as full compensatory and punitive damages, and procedures such as a jury trial, that the state has deemed necessary to compensate victims and deter privacy violations. Yet that is precisely what this Court in *Lingle v. Norge*, 486 U.S. 399 (1988), held was not preempted.

Finally, respondents make no reply to the Petition's contention, at 13-14, that the overbroad preemption doctrine adopted below fails to accommodate the state and federal interests at stake. As petitioner reads this Court's rulings, a theoretical dependence on provisions of a CBA is not enough to warrant federal preemption; rather, actual dependence is required, and it is necessary to inspect the CBA closely enough to determine whether there are provisions that appear to have some bearing on the state law claim. *Cf. Conrail v. RLEA*, 491 U.S. 299 (1989) (court must decide whether the employer is "arguably justified" in contending that the CBA licenses its conduct before declaring a dispute "minor," thus invoking grievance procedures under Railway Labor Act). *See also Lingle, supra*, 486 U.S. at 413 n.12 (1988) (case could

include some propositions that depend on CBA and some that do not, without entire claim being preempted). Otherwise, any employer with sufficient imagination could "construe" a clause in a CBA as bearing on any state law claim, with the result that the claim would be preempted, even though the CBA in fact was neither the basis of the claim, nor had any actual bearing on it.[1]

2. The Petition also showed that the lower courts continue to struggle with the question of how much dependence on a CBA is too much and that review is also warranted to clarify this issue. Other circuits have been scrupulous to avoid finding preemption based on merely theoretical dependence of a state law claim on the provisions of a CBA, and have allowed "the process" of CBA interpretation to function while permitting the state law claim to proceed if, after arbitration, it turns out that the CBA does not bar the state law claim. Several such appellate decisions are cited in the Petition, at 22-23,[2] and in denying the existence of a conflict among the circuits, Opposition at 11-12 and n.9, respondents simply ignore them.

Even with respect to the conflicting cases that respondents do acknowledge, they rely entirely on labels to distinguish those decisions from the ruling below. The other cases are not in conflict, say respondents, Opposition at 12 n.9, because those are retaliation or discrimination cases, while this is a privacy case. But respondents ignore the fact that the employer in each of these cases tried to obtain preemption by

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[1] Here, the only CBA provisions that respondents are able to identify as bearing on the state law privacy issue are two clauses that emphasize the general importance of workplace safety, but do not even mention its relation to claims of privacy. Opposition at 2.

[2] *E.g.*, *Matter of Chicago, Milwaukee RR Co.*, 852 F.2d 960 (7th Cir. 1988); *Dougherty v. Parsec*, 872 F.2d 766 (6th Cir. 1989).

arguing that the CBA undercut an element of the plaintiff's state law claim, and the nature of that claim, be it retaliation or discrimination, was irrelevant to the preemption sought.[3]

3. The Opposition contains another key concession: it admits that if the state law claim is ultimately preempted, removal is nonetheless improper if the CBA becomes relevant to the state law claim only to support the employer's defense. Opposition at 3-4, *quoting* distinction with approval; *see also id.* at 6-7. *Accord*, *Welch v. General Motors Corp.*, 922 F.2d 287, 293 (6th Cir. 1990). In order to show the defensive nature of the CBA here, the Petition advanced two propositions. First, the only possible relevance of the CBA under state law is to show that petitioner's union had waived his state privacy rights. Petition at 5. Second, even if a CBA could be relevant to the determination of an employee's reasonable expectations, it would be relevant to the employer's attack on reasonableness, but not be part of the employee's case. *Id.* at 17.

Respondents completely ignore the second argument, and cite not a single decision in trying to rebut the first argument. Almost all of page 7 of the Opposition is consumed by a string citation for the proposition that privacy rights depend on the reasonable expectations of the parties which, in turn, "*is measured by common habits in the use of domestic and business properties.*" *Id.* (emphasis in original). But this test, found in a California Supreme Court decision that respondents cite, looks not to a particular agreement between the parties, but rather to trends and patterns in business and social relationships as a whole. Indeed, on the

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[3] Contrary to respondents' assertion, Opposition at 12, some courts hold that state law privacy claims survive section 301 preemption. *Cronan v. New England T&T Co.*, 1 IER Cases 658, 661 (D. Mass. 1986); *Cokely v. Pacific Gas & Elec.*, 119 LRRM 3455, 3458 (N.D. Cal. 1984).

following page, when respondents turn from their string citation to the key proposition on which their argument depends -- that the "foremost" circumstance bearing on the reasonable expectations of the parties is a CBA -- they provide not a *single* citation, to either a state or a federal decision. Opposition at 8. Later in the Opposition, when respondents return to the question of how state privacy law treats a CBA, they cite three decisions -- one dictum from an intermediate California appellate court, and two previous Ninth Circuit holdings -- for the proposition that a CBA may be relevant to a state law privacy claim because it may waive state privacy rights. Opposition at 10 n.8, and accompanying text. Yet that is precisely the relationship between CBA and privacy that they earlier took such pains to deny, and one that they admit is insufficient to support removal.[4]

Petitioner acknowledged the one California case containing dictum supporting waivability, while pointing out that another intermediate state appellate court decision had held that state law privacy rights may not be waived because the California Constitution describes the right as "inalienable." Petition at 5-6. Because the California courts have not yet sorted out how they view asserted "waivers" of the right of privacy, it is especially important that federal removal and preemption doctrine be applied to permit cases involving such waiver defenses to be litigated in the California courts, rather than the federal courts. Otherwise, removal (or a refusal to abstain) prevents the state courts from construing their own state's law in such a way as to avoid a constitutional confrontation with federal law.

As a result of the decision below, only the most foolhardy

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[4] The state case cited by respondents did not, in fact, discuss whether a CBA may waive privacy rights; it simply indicated that the plaintiff there could have voluntarily submitted to urinalysis without violating public policy.

employer would fail to remove a state law privacy claim to federal court to take advantage of the sweeping preemption granted by the Ninth Circuit. Consequently, the California courts will never have the opportunity to address the issue of the relationship between a CBA and the California right of privacy. Only by reviewing and reversing the decision below can this Court ensure that it is the California courts, not the federal courts, that will have the final word on this important question of state law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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